ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-5841

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

The Solicitor General does not dispute that the Circuits are currently split 8-3 as to which of two objective tests should be applied to determine when an allegedly pretextual traffic stop was objectively justified. The government suggests, however, that the conflict may soon lessen because the Tenth Circuit has recently heard en banc argument to consider overruling United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (adopting "would have" test). Gov't Opp. at 8-9.[1] But the fact that the Tenth Circuit is struggling to determine the proper Fourth Amendment test only

[1] The Florida Supreme Court recently reaffirmed its adherence to the minority test urged by petitioners, noting that this Court has yet to resolve the split of authority over the proper Fourth Amendment standard. State v. Daniel, No. 84,486, 1995 Fla. LEXIS 1558, *3 n.1 (Sept. 28, 1995). The question in Daniel was certified as being "of great public importance." Id. at *1.

highlights the need for guidance from this Court. The Tenth Circuit's interest in the issue also undercuts the government's argument that it does not matter which test the Circuits apply because traffic stops are generally upheld under both tests. The Tenth Circuit would not have considered the issue "en banc-worthy," and other state and federal courts would not persist in debating the proper test, if the issue were purely academic.

The Solicitor General is wrong in suggesting that petitioners here lose under either test. Gov't Opp. at 10-11. As explained in the Petition at pp. 15-17, the traffic stop in this case cannot pass the "would have" test used by the Ninth, Tenth and Eleventh Circuits and several state courts. The government contends that there is nothing in the record to indicate that a reasonable police officer would not have made this traffic stop. Govt' Opp. 10. Petitioners' contention is that no reasonable officer would have made this stop because it directly violated a police regulation -- District of Columbia Metropolitan Police Department General Order 303.1(A)(2)(a), prohibiting traffic enforcement action by plainclothes officers and officers in unmarked cars except in certain narrow circumstances not present here.

The government has not disputed that the police officers here acted unreasonably in violating the written regulations governing their conduct but argues that petitioners "waived" their reliance on the regulation at issue by failing to raise it prior to trial. Contrary to the government's suggestion, Gov't Opp. at 11, petitioners fully preserved this issue under Fed. R. Crim. P.

12(b)(3) by moving to suppress the evidence found in the Pathfinder on the ground that it was the fruit of a pretextual traffic stop that was unreasonable under the Fourth Amendment. Moreover, at trial, counsel for Mr. Whren attempted on three separate occasions to cross-examine the officers concerning this particular regulation but the court precluded such questioning (Gov't C.A. Br. 23 n.12, citing Tr. 391, 479, 496). Defense counsel explicitly renewed the motion to suppress at the close of the government's case (Tr. 439-40).

In any event, even if the regulation had not been brought to the trial court's attention, it can be considered on appeal in the same manner as any other legal authority. See Barnette v. United States, 525 A.2d 197, 198-199 n.5 (D.C. 1987) (taking notice, sua sponte, of MPD General Order 303.1(G)(1), regulating enforcement of traffic laws against pedestrians). The facts demonstrating the violation of General Order 303.1(A)(2)(a) were fully developed during the suppression hearing. See Pet. App. 2 & Tr. 10 (officers were in plainclothes in unmarked cars); Tr. 72-73 (Pathfinder was not endangering anyone's safety). The D.C. Circuit never suggested that petitioners could not rely on that regulation on appeal.

The government does not dispute that the "would have" test is an objective standard by which to evaluate allegedly pretextual traffic stops but argues against that test on the ground that it makes the constitutional validity of a traffic stop "'subject to the vagaries of police departments' policies and procedures.'" Gov't Opp. at 11, quoting Pet. App. 6 (other quotations omitted).

In fact, the test urged by petitioners merely subjects such stops to the reasonableness requirement of the Fourth Amendment and recognizes that a traffic stop made in violation of police regulations can be an unreasonable seizure even where there exists probable cause of a traffic violation. This Court in United States v. Robinson, 414 U.S. 218 (1973), left open the possibility that established police department practice might be relevant to claims of pretextual police action. The Robinson Court declined to reach Robinson's pretextual traffic arrest claim because 1) Robinson was "lawfully arrested" (which is essentially all the "could have" courts require); and 2) the arrest was "not a departure from established police department practice" (as required by the "would have" courts). Id. at 221 n.1 (emphasis added). The Court explicitly "le[ft] for another day questions which would arise on facts different from these." Id. Because the stop here was a clear violation of police regulations -- a factor that was not present in the pretextual traffic stop cases cited by the government in which this Court has denied certiorari -- this case presents the ideal vehicle for determining whether departure from standard police practice can render an allegedly pretextual traffic stop "unreasonable" under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Lisa Burget Wright, a member of the bar of this Court, certifies pursuant to Rule 29 of this Court, that on December 13, 1995, she served the within PETITIONERS' REPLY BRIEF on counsel for respondent by depositing three copies of said reply in the United States mail at Washington, D.C. first-class postage prepaid, addressed to:

Honorable Drew S. Days, III
Solicitor General of the United States
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All parties required to be served have been served.

Lisa Burget Wright

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